IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 5TH DECEMBER 2006 / 14TH AGRAHAYANA 1928

RSA.No. 20 of 2005()

AS.50/2001 of SUB COURT, THIRUVALLA
OS.526/1996 of MUNSIFF COURT, THIRUVALLA

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APPELLANTS/APPELLANTS/PLAINTIFF 2 TO 5.

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1. SR.BORGIA, D/O. LATE KURIAN,
   AGED 63 YEARS, KALARIKKALAYA MANNOOR HOUSE,
   EZHINJILLAM KARA, KAVUMBHAGOM VILLAGE.

2. K.K.KURIAN, AGED 58 YEARS,
   OF -DO- -DO-

3. THRESSIAMMA JOSEPH, ALIAS KUNJAMMA,
   D/O. LATE KURIAN, AGED 52, OF -DO- -DO-

4. ELSAMMA JAMES, D/O. LATE KURIAN,
   AGED 53 YEARS, OF -DO- -DO-

BY ADV. SRI.K.S.HARIHARAPUTHRAN
SRI.GEORGE MATHEW

RESPONDENTS: RESPONDENT/DEFENDANTS.

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1. AMMINI KURIAN, W/O. LATE KURIAN
   AGED ABOVE 63 YEARS, RESIDING IN KALARIKKALAYA
   KATTOPARAMBIL IN EZHINJILLAM MURI OF
   KAVUMBHAGOM VILLAGE.

2. RONY CHERIAN, S/O. CHERIAN,
   RESIDING IN CHIRAMUKATH IN PERUNNA KIZHAKKUM MURI
   OF CHANGANACHERRY VILLAGE.

3. THAAISE RONY CHERIAN,
   W/O. RONY CHERIAN, AGED ABOUT 28 YEARS,
   RESIDING IN -DO- -DO-.

4. SUSAMMA BENADICT, D/O. LATE KURIAN,
AGED 51 YEARS, KALARIKKALAYA MANNOOR HOUSE,
EZHINJILLAM KARA, KAVUMBHAGOM VILLAGE,
NOW RESIDING AT IN JOSEPH WAIMER,
STREET - 18, 41466 NEUSS GERMANY.

R2, R3 BY ADV. SRI.SIBY MATHEW
SRI.A.A.MOHAMMED NAZIR

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 05/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN, J

C.M.APPL.No.16 of 2005 &
R.S.A.No.20 OF 2005

Dated this the 5th day of December, 2006

JUDGMENT

The captioned application to condone delay of 18 days is filed on the ground that certain lapses on the part of the Advocate's clerk caused the delay. Notice was ordered on that application on 14.1.2005. The file shows that service is not yet complete in spite of repeated reminders to take steps for issuance of fresh notice to respondents 1 and 4 since notice issued to them were returned stating that they are somewhere in Bangalore. In the mean while, the contesting respondents 2 and 3 have filed a counter affidavit in opposition to the application to condone delay and have brought up the matter pointing out the non-prosecution, by taking due steps.

2. Having regard to the fact that the second appeal was apparently not considered on its merits till now, I have heard learned counsel for the appellant touching the merits of the matter.

3. Learned counsel for the appellant urges that the plaintiffs have been denied a decree of perpetual injunction simplicitor against trespass on a finding that the suit property is in the possession of a lessee of the plaintiffs and that such finding is contrary to law in as much as it is a fundamental jurisprudence equation that a lessee's possession can also be protected by the lessor whose title dominates that of the lessee. In driving home this point, learned counsel relied on Salmond on Jurisprudence. In my view, there can be no quarrel on the proposition of law advanced on behalf of the plaintiffs.

4. The case in hand discloses entirely different controversies. Five persons joined as plaintiffs and sued five by asserting that plaintiffs and the 5th defendant are the children of Kalarikkalaya Mannoor Kurian and that defendants 1 to 4 were involved in an activity of creating unauthorised documents and claiming possession. The contesting defendants 3 and 4 challenge even the paternity pleaded. They contended that the

plaintiffs and the 5th defendant are not the children of Kalarikkalaya Mannoor Kurian, but they are the children of one Chandy Kurian. Defendants 1 and 2 remained ex parte. Defendants 3 and 4 raised a counter claim. The suit and the counter claim were dismissed by the trial court. Four plaintiffs filed a first appeal. In the first appeal, they did not take necessary steps to issue notice to respondents 1 and 4, who were respectively defendants 1 and 5 in the suit. The appeal was dismissed. The counter claim was also dismissed. In the absence of service of notice on defendants 1 and 5, I wonder why the lower court proceeded to render a decision on merits because if the appeal as against defendants 1 and 5 stood concluded on default, there was no reason why the appeal could have been entertained and considered on merits as regards the other respondents. I say so, because, though suit is characterised as one for an injunction simplicitor, that relief is sought for, asserting possession on the strength of title and the pleadings in the case unequivocally show the eloquent contest on the question of title. On the face of the

assertion of the contesting defendants that the plaintiffs did not have title to the property, if the suit for injunction simplicitor was to sustain, it has necessarily to be on the strength of title.

5. In the aforesaid circumstance, I do not find any ground to entertain the second appeal notwithstanding the fact that respondents 1 and 4 are yet to be served even on the application to condone delay.

In the result, the second appeal itself is without any merit. The application to condone delay and the second appeal are accordingly dismissed. No costs.

THOTTATHIL B.RADHAKRISHNAN
Judge

kkb.